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No. 90-1859

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

J.C. KEENEY,

Petitioner,

v.

JOSE TAMAYO-REYES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Is "deliberate by-pass" or "cause and prejudice" the correct test for determining when a federal habeas petitioner will be excused for failing to develop a material fact in state court?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Tamayo-Reyes v. Keeney*, 926 F.2d 1492 (9th Cir. 1991). Neither the magistrate's findings and recommendation nor the district court's opinion is reported.[1]

JURISDICTION

Section 1254(1) of Title 28 gives the Court jurisdiction to issue a writ of certiorari to the federal courts of appeals. The court of appeals' judgment was entered on March 4, 1991. A timely petition for certiorari was filed on June 3, 1991. *See* 28 U.S.C. section 2101(c); Supreme Court Rule 13.1.

STATUTES INVOLVED

Section 2254(d) of Title 28 provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved by the State court hearing;

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[1] Copies of the Ninth Circuit's opinion, the district court's opinion, and the magistrate's findings and recommendation are reproduced in the appendix to the petition for certiorari.

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when the proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden

shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Respondent Jose Tamayo-Reyes was convicted of manslaughter. The death occurred during a knife fight between Tamayo-Reyes and his fiancée in a Portland, Oregon tavern. When a stranger tried to break up the fight, Tamayo-Reyes turned, stabbed the stranger, and killed him. The State charged Tamayo-Reyes with murder. An attorney was appointed to represent him. Because Tamayo-Reyes spoke little or no English, an interpreter, Ben Sanchez, was also appointed. Not only is Spanish Sanchez' native language, but he is an attorney as well.

Before trial, Tamayo-Reyes chose to plead no contest to a lesser charge of first degree manslaughter.[2] Before doing so, he and his attorney filled out a plea petition. The petition specified the rights Tamayo-Reyes was giving up, the crime to which he was pleading, the maximum sentence possible, the sentence the district attorney recommended, and the factual basis for the plea. *See* J.A. 10-14. Paragraph 4 of the signed plea petition stated:

> I told my lawyer all the facts and circumstances known about the charges against me. I believe that my lawyer is fully informed on all such matters. My lawyer has counseled and advised me on the nature of each charge; on any and all lesser included charges; and on all possible defenses I might have in this case.

J.A. 10. Additionally, Tamayo-Reyes' trial attorney certified that he "ha[s] had read and fully explained to the defendant the allegations contained in the indictment in this case." J.A. 13.

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[2] When Tamayo-Reyes committed the homicide in 1984, Or. Rev. Stat. § 163.118(1) provided: "Criminal homicide constitutes manslaughter in the first degree when [i]t is committed recklessly under circumstances manifesting extreme indifference to the value of human life."

Before the state trial court accepted the no-contest plea, it questioned Tamayo-Reyes' attorney about the plea petition. His attorney told the court:

> I had Mr. Sanchez translate the English [plea petition] form, from English to Spanish, directly to the defendant in my presence. Mr. Sanchez went over the form with him in Spanish. I asked [Tamayo-Reyes] if he understood it. He indicated he did understand it, and did wish to proceed as we contemplate proceeding this morning.

J.A. 3. The state trial court questioned Sanchez about his ability as a translator.[3] J.A. 3. It then advised Tamayo-Reyes of his rights a second time. It detailed on the record the rights he was giving up and asked whether he understood what it had explained to him. J.A. 4-5. When Tamayo-Reyes responded, "More or less," the court was careful to be sure he understood. *See* J.A. 5-7.

The trial court explained: "You have two choices: You can have a jury trial on the charge of murder, or you can be convicted at this time, by your agreement of the charge of manslaughter." J.A. 6. At this point, Tamayo-Reyes' counsel asked to speak with his client. After an off-the-record discussion among Tamayo-Reyes, Sanchez, and the defense attorney, Tamayo-Reyes agreed to the plea. J.A. 6. The trial court asked whether Tamayo-Reyes now understood his right to have a jury trial on the charge of murder, whether he chose instead to be convicted of the charge of manslaughter, and whether he understood that his decision could lead to his deportation. J.A.

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[3] The court asked whether Sanchez read, wrote, and spoke Spanish fluently. J.A. 3. Sanchez replied that he spoke it, but did not read or write it. J.A. 3. Sanchez' fluency in Spanish was later explored at greater length in the post-conviction proceeding. *See* J.A. 22-23, 26-29.

6. Tamayo-Reyes replied yes to each of these questions. J.A. 6. Based on Tamayo-Reyes' responses and the signed plea petition, the trial court found that Tamayo-Reyes knowingly and voluntarily "chose to plead no contest and accept the consequences of a conviction for manslaughter in the first degree." J.A. 8.

Approximately a year later, Tamayo-Reyes filed a petition for state post-conviction relief. An attorney was appointed to represent him, and the full panoply of procedures — discovery, compulsory process, and cross-examination — was available to develop Tamayo-Reyes' claims. Tamayo-Reyes, through his attorney, filed an amended post-conviction petition. The amended petition alleged that Tamayo-Reyes' no-contest plea was not knowingly and voluntarily entered.[4] J.A. 16. The focus of the post-conviction petition was that Tamayo-Reyes had not understood that he had given up the right to a jury trial. J.A. 16-17. He alleged that his interpreter Sanchez failed to make clear to him that the charge was being reduced from murder to manslaughter only in return for what was, in effect, a guilty plea. J.A. 16-17.

Tamayo-Reyes' testimony at his post-conviction hearing tracked the allegations in his post-conviction petition. He testified that he remembered signing the plea petition but did not understand he was waiving his right to a jury trial. J.A. 39-41. He said that Sanchez had told him to sign the plea petition without explaining what it was and that Sanchez had assured him he would still have a jury trial. J.A. 40. In closing argument,

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[4] The amended post-conviction petition contained three claims for relief. The Ninth Circuit held that Tamayo-Reyes abandoned the last two claims. *Tamayo-Reyes v. Keeney*, 926 F.2d, at 1494 n. 2. Tamayo-Reyes has not filed a cross-petition for certiorari challenging that portion of the Ninth Circuit's decision.

Tamayo-Reyes' attorney raised an issue that neither the amended petition nor Tamayo-Reyes' testimony had suggested. He argued that Sanchez had provided Tamayo-Reyes with a "very incomplete" interpretation of manslaughter.[5] J.A. 44.

After considering the evidence, the state post-conviction court made the following findings:

> 1. Petitioner's plea of [no-contest] was knowingly and voluntarily entered.
>
> 2. Petitioner was properly served by an interpreter in the proceedings leading to his conviction.
>
> 3. The interpreter correctly, fully, and accurately translated the communications between Petitioner and his attorney.
>
> 4. Petitioner has not sustained his burden of proof in regard to any of the allegations in his petition.
>
> 5. Representation by [trial] counsel was reasonable and effective under the circumstances.

J.A. 51. Based on these findings, the state post-conviction court denied Tamayo-Reyes relief. J.A. 51. The Oregon Court of Appeals affirmed, *Reyes v. Keeney*, 88 Or. App. 187, 744 P.2d 1011 (1987), and the Oregon Supreme Court declined to grant discretionary review, *Reyes v. Keeney*, 304 Or. 680, 748 P.2d 142 (1987).

Tamayo-Reyes then filed a habeas petition in federal court. His federal habeas petition alleged, as his state post-conviction petition had, that his plea was neither knowing nor voluntary because he had not understood that pleading no-contest meant he

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[5] The argument was based on a passage from Sanchez' deposition. *See* note 6 *infra*. Tamayo-Reyes had never alleged nor testified that he did not know the elements of manslaughter.

was giving up his right to a jury trial. J.A. 56-57. He also argued, as he had in the closing moments of the state post-conviction proceeding, that the interpreter had not provided a complete or accurate definition of manslaughter. *See* Pet. Cert., App-32. He asked for a federal evidentiary hearing to develop additional evidence on the adequacy of Sanchez' translation. *See* Pet. Cert., App-34.

On this latter point, Tamayo-Reyes appears to have argued that his state post-conviction counsel failed to develop two related but separate types of evidence. First, he faulted his state post-conviction counsel for failing to inquire more fully during Sanchez' deposition what Spanish phrases Sanchez used to translate the elements of manslaughter.[6] Second, he faulted his state post-conviction counsel for failing to introduce expert testimony that would have allowed the post-conviction court to determine whether Sanchez' command of Spanish was sufficient.[7] These failures, Tamayo-Reyes argued, entitled him to a federal evidentiary hearing.

The federal district court denied Tamayo-Reyes' habeas petition. It held that the state post-conviction court's factual

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[6] During the deposition, Tamayo-Reyes' post-conviction counsel asked Sanchez whether he recalled "specifically some words that [he] used" almost two years earlier to translate the elements of murder and manslaughter. J.A. 26. Sanchez could recall some of the specific words he used, but not all of them. J.A. 26-27.

[7] In closing argument in the post-conviction court, Tamayo-Reyes' counsel relied on his own knowledge of Spanish to argue that the Spanish translation Sanchez remembered telling Tamayo-Reyes was incorrect. J.A. 42-43. When the State objected that counsel was going beyond the record, Tamayo-Reyes' counsel explained that he could make the same point relying on the English explanation of Sanchez' Spanish, which was in the record. J.A. 43-44. The state post-conviction court considered the argument based on the English explanation.

findings disposed of Tamayo-Reyes' federal claims. It also rejected Tamayo-Reyes' claim that a new evidentiary hearing was required because his counsel failed to develop material facts at the state post-conviction hearing. The court found that Tamayo-Reyes had not established that the failure to do so was not due to inexcusable neglect. Pet. Cert., App-32.

The Ninth Circuit reversed and remanded. *Tamayo-Reyes v. Keeney*, 926 F.2d, at 1502. It concluded that material facts were not adequately developed at the state post-conviction hearing — specifically, the way in which Sanchez translated the mental element of manslaughter. *Id.*, at 1500. It held that federal courts need not defer to state court fact findings unless the failure to develop the material facts in state court was due to the habeas petitioner's deliberate by-pass. *Id.*, at 1501-02. Under the Ninth Circuit's reasoning, the deliberate by-pass standard announced in *Fay v. Noia*, 372 U.S. 391 (1963), provides the applicable test when a habeas petitioner seeks to have the federal courts reconsider factual disputes the state court has already resolved. *Ibid.*

SUMMARY OF ARGUMENT

The Court has recognized the power of a federal habeas court to reach a state prisoner's unpreserved federal claims. With that recognition, the Court has observed that this power must be exercised in a way that fosters and preserves a proper balance in the relationship between state and federal courts. The Court initially viewed the "deliberate by-pass" test as an appropriate accommodation of federalism policies. Since then, however, the Court has acknowledged that this standard seriously erodes the importance of the state judicial process and protracts litigation unnecessarily. As a result, the "deliberate by-

pass" standard for the most part has been abandoned and the "cause and prejudice" test has been embraced in its place.

This case presents one of the few contexts, if not the only one, in which deliberate by-pass still applies. *Townsend v. Sain*, 372 U.S. 293 (1963), articulates deliberate by-pass as the correct test when a petitioner seeks a federal hearing because facts material to his claim were not developed in the state court proceedings. *Townsend* relies on case law this Court has since disavowed and on policies it has since reassessed. Its use of deliberate by-pass as a standard undermines comity and federalism concerns in ways that have caused the Court to reject the test in other cases. Specifically, it renders the state court procedures secondary to federal habeas, it unduly protracts litigation, and it burdens federal court resources.

The only argument that can be made to defend *Townsend*'s use of the deliberate by-pass test is that a petitioner's failure to develop the material facts fully in his state trial is somehow different from the failure to raise his federal claim altogether. To the contrary, however, the two situations are essentially identical and any distinction would be artificial. As a result, for the reasons the Court has abandoned the deliberate by-pass test in failure to preserve contexts, it should abandon the test here. Such a holding is true to the Court's precedents, to the federal-state policies that should guide the inquiry, and to the language and policy of the federal statutes that govern habeas proceedings.

ARGUMENT

This case presents the Court with a narrow and straightforward question: Whether deliberate by-pass is the correct test for determining when a federal habeas petitioner will be excused for failing to develop a material fact in state court, thus entitling a petitioner to a new evidentiary hearing in federal court. *Fay v.*

Noia, 372 U.S., at 430-431, held that federal courts have the power to consider a state prisoner's unpreserved federal claims, but that they retain discretion to deny the writ when a habeas petitioner has "deliberately by-passed the orderly procedure of the state courts." *Id.*, at 438. *Townsend v. Sain*, 372 U.S. 293 (1963), decided the same day, extended *Fay*'s deliberate by-pass test to circumstances in which "the material facts were not adequately developed at the state-court hearing." In both cases, the Court recognized that granting federal hearings on claims that were not preserved in state court ran the risk that there would be little incentive for state prisoners to take state proceedings seriously. The Court concluded, however, that refusing to grant a federal hearing when the petitioner had knowingly waived a state process of which he was fully aware (a "deliberate by-pass") would serve to balance state and federal interests appropriately.

Since *Fay* and *Townsend* were decided, the Court has reconsidered the balance it struck between state and federal interests. In each instance, in the context of a habeas petitioner's failure to preserve a federal claim in state court, the Court has rejected the deliberate by-pass test and adopted the cause and prejudice test in its place. The Court has reasoned that the deliberate by-pass standard provides petitioners with too little incentive to litigate their federal claims fully in state court and it gives too little weight to the States' interest in finality of convictions. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977); *Engle v. Isaac*, 456 U.S. 107, 127 (1982); *Murray v. Carrier*, 477 U.S. 478, 487 (1986). In retreating from the deliberate by-pass test, the Court initially limited *Fay* to its facts. *Wainwright v. Sykes*, 433 U.S., at 88 and n. 12. Last term, the Court expressly disavowed *Fay* and rejected its rationale altogether.

Coleman v. Thompson, ___ U.S. ___, 111 S. Ct. 2546, 2565 (1991).

Given these doctrinal developments, the question in this case reduces to this: Whether the policies that have caused the Court to reject "deliberate by-pass" in all other contexts apply with equal force when a petitioner seeks a federal evidentiary hearing on the ground that a material fact was not developed in state court. More precisely, the question is whether *Townsend* is still good law. In the State's view, the Court's decisions since *Fay* provide the short answer to that question. The holdings in *Wainwright*, *Murray*, and *Coleman* compel the conclusion that the Ninth Circuit erred in holding that deliberate by-pass remains the proper test for determining a habeas petitioner's right to a federal evidentiary hearing. The same result follows from a more complete examination of the context in which *Townsend* was decided, the costs *Townsend*'s standard imposes on state-federal relations, the Court's compelling rationale in *Wainwright*, *Coleman*, and other cases, and the policies underlying 28 U.S.C. section 2254(d).

A. Townsend and Its Costs.

Initially, a person sentenced for a state crime had no right to seek federal habeas. *See McCleskey v. Zant*, ___ U.S. ___, 111 S. Ct. 1454, 1461-1462 (1991); *Brown v. Allen*, 344 U.S. 443, 499 (1953) (Opinion of Frankfurter, J.). Congress did not extend federal habeas to persons held in state custody until 1867, *ibid.*,[8] and the Court was quick to recognize that the 1867 Act

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[8] A majority of the Court in *Brown* suggested that the constitution did not require Congress to extend federal habeas to state prisoners. *See Brown v. Allen*, 344 U.S., at 499 (Opinion of Frankfurter, J.); *id.* at 488 (Opinion of Burton and Clark, JJ.) (recognizing propriety of Justice Frankfurter's views);

(continued...)

imposed a concomitant obligation on federal courts to exercise their newly granted jurisdiction consistent with principles of federalism, *Ex Parte Royall*, 117 U.S. 241, 251 (1886). As Justice Harlan explained in *Ex Parte Royall*, the federal power to re-examine state convictions must be exercised "in recognition of the fact that the public good requires that th[e] relations [between the federal government and the States] be not disturbed by unnecessary conflict by courts equally bound to guard and protect rights secured by the Constitution." *Ibid.*

The substantive scope of the federal authority to re-examine state convictions has been subject to dispute. *Compare Brown v. Allen*, 344 U.S., at 462-465 (federal courts may re-examine any claim of constitutional error that was fully litigated in state court), *with* Bator, *Finality in Criminal Law*, 76 HARV. L. REV. 441 (1963) (federal courts' habeas jurisdiction limited to claims that state court lacked jurisdiction or failed to provide adequate corrective processes). One principle has remained constant, however: The Court has recognized that a federal district court sitting in habeas ordinarily should defer, as a matter of comity and federalism, to the state court's resolution of historical facts. The Court explained in *Brown v. Allen*, 344 U.S., at 463, "if the [federal district] court is satisfied, by the [state court] record, that the state process has given fair consideration to the issues

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[8](...continued)
id. at 513 (Opinion of Black and Douglas, JJ.) (agreeing with Justice Frankfurter's views). Justice Frankfurter reasoned:

> Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States Constitution.

344 U.S., at 499.

and the offered evidence, and has resulted in a satisfactory conclusion," "a repetition of the trial is not required."[9]

Townsend v. Sain begins from the same principle. It recognizes that a federal court "may, and ordinarily should, accept the facts" found by the state court when the habeas petitioner has been "afforded a full and fair hearing." 372 U.S., at 318. *Townsend* goes beyond *Brown*, however, in explaining when a federal court is required to hold a new evidentiary hearing. *Brown* focused on a flaw in the fact-finding process as the justification for a federal evidentiary hearing. 344 U.S., at 463, 506. *Townsend* reasons that a new federal evidentiary hearing is also required when "the material facts were not adequately developed at the state court hearing," subject only to the petitioner's deliberate by-pass. 372 U.S., at 313, 317. *Townsend* thus shifts the focus from the reliability of the state fact-finding process to the reliability of the particular facts the state court found.

Townsend's shift has a significant impact on both finality of convictions and relations between the state and federal governments. Pursuant to *Townsend*, a federal habeas petitioner may relitigate the validity of his state conviction whenever he can think of a single material fact that he inadvertently failed to present to the state court. It is the rare habeas petitioner who cannot envision how his case might have been tried better, and

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[9] As Justice Frankfurter put it in *Brown*, when a habeas petitioner's federal claim turns on basic facts that "have been tried and adjudicated against the [petitioner]," a federal court may deny the petition absent a "vital flaw . . . in the process of ascertaining such facts." 344 U.S., at 506 (Opinion of Frankfurter, J.). Although *Brown* recognized that federal courts have the power to hold new evidentiary hearings in every case, it also recognized that a federal court should ordinarily defer to state fact findings absent some flaw in the state procedures.

Townsend's shift from the reliability of the process to the elimination of potential error makes virtually every state conviction subject to re-examination in federal court.

The resulting diminution of finality is not so much a consequence of the recognition that federal courts have the power to hold new evidentiary hearings. *Brown* establishes that much. It results instead from the test *Townsend* and *Fay* state for the exercise of that power. Rather than requiring a habeas petitioner to show some cause for failing to present his evidence to the state court, the only limit *Townsend* expresses to the continual relitigation of facts underlying a federal claim is the petitioner's deliberate by-pass.

Townsend's change of focus also impairs the relations between state and federal courts. Basing the right to a federal evidentiary hearing on a habeas petitioner's failure to take advantage of the state proceedings diminishes the significance of the state hearings. It exacerbates the "inevitable friction" that arises when a federal habeas court effectively is asked to "overtur[n] either the factual or legal conclusions reached by the state-court system," *Sumner v. Mata*, 449 U.S. 539, 550 (1981). Deliberate by-pass does not provide sufficient protection for the State's interests. It leaves habeas petitioners with little incentive to take the state proceedings seriously. It converts the state hearing from "'the main event'" into a "'a tryout on the road' for what will later be the determinative federal hearing," contrary to the reasoning in *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

To be sure, if the state procedures did not provide an adequate or fair opportunity to develop the facts, the issue would be different. Or if a habeas petitioner could show some good reason for failing to develop his evidence in the state proceeding, then a new evidentiary hearing would perhaps be justified. But *Townsend* does not condition the right to a federal evidentiary hearing on establishing cause (much less prejudice) for failing to bring material facts to the state court's attention. Rather, it reasons that absent deliberate by-pass, any failure to take advantage of the state proceedings will entitle a habeas petitioner to a new evidentiary hearing in federal court. That reasoning imposes significant costs on both the finality of convictions and federalism.

B. Cause and Prejudice Applies Equally to Evidentiary Hearings.

These same costs have convinced the Court to make cause and prejudice, not deliberate by-pass, the test for determining when to excuse a petitioner's failure to raise a federal claim in state court. *Coleman v. Thompson*, 111 S. Ct., at 2563-2565; *McCleskey v. Zant*, 111 S. Ct., at 1471; *Murray v. Carrier*, 477 U.S. 478 (1986); *Engle v. Isaac*, 456 U.S. 107, 126-127; *Wainwright v. Sykes*, *supra*. With respect to finality, the Court has recognized that deliberate by-pass denies society's and the individual defendant's "'interest in insuring that there will at some point be the certainty that comes with an end to litigation'" and that attention will "'be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.'" *Coleman v. Thompson*, 111 S. Ct., at 2564 (quoting *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting)). As the Court explained in *McCleskey v. Zant*, 111 S. Ct., at 1468 "[t]hough *Fay v. Noia*, *supra*, may have cast doubt upon these propositions, since *Fay* we have taken care in our habeas corpus decisions to reconfirm the importance of finality."

With respect to comity and federalism, the Court has recognized that deliberate by-pass diminishes the significance of the state proceedings. *Murray v. Carrier*, 477 U.S., at 487; *Wainwright v. Sykes*, 433 U.S., at 90. It gives too little weight to the States' interest in enforcing procedural rules that are designed to bring a conclusion to litigation. *Ibid.* It denies States the opportunity to consider the petitioner's federal claims, and it deprives them of the opportunity to correct any error in the proceedings. *Ibid.*

The reasoning in *Coleman*, *McCleskey*, and *Wainwright* applies with equal force to the issue here. Relitigating facts that could have been but were not developed in state court imposes the same costs on finality that relitigating unpreserved issues does. Both denigrate state procedural rules that are designed to make the state hearing the focus of the habeas petitioner's federal claims and bring the matter to a conclusion. Each effectively shifts the petitioner's focus and society's resources from reformation to a continual search for possible error. Each deprives the state court of the opportunity to decide the petitioner's federal claim, diminishes the role of the state hearing, and unnecessarily increases the friction between coordinate systems of government.

Not only does the rationale of the Court's more recent decisions demonstrate that cause and prejudice should govern a habeas petitioner's right to a new evidentiary hearing, but the reasoning in *Townsend* points in the same direction. *Townsend* acknowledged that the same standard should apply whether a habeas petitioner sought to have the courts consider an issue he failed to raise in state court or a material fact he failed to develop in state court. *Townsend v. Sain*, 372 U.S., at 317. If cause and prejudice now governs the former issue, as cases

decided since *Townsend* have concluded, it follows that it should also govern the latter. It would make little sense to hold a criminal defendant responsible for raising all federal issues in state court (or show cause and prejudice for failing to do so) but not hold him equally responsible for presenting all evidence material to the resolution of those claims to the state court. Each default imposes the same costs on federalism and on the States' interest in the finality of convictions.

C. Section 2254(d).

Not only does the case law require the application of cause and prejudice but the same result also follows from the 1966 amendments to 28 U.S.C. section 2254. Three years after the Court decided *Townsend*, Congress amended section 2254 to address evidentiary hearings. *See Sumner v. Mata*, 449 U.S. 539 (1981). The purpose of the amendment was to minimize the "inevitable friction" that arises when a federal court is asked in effect to "overtur[n] either the factual or legal conclusions reached by the state-court system." *Sumner v. Mata*, 449 U.S., at 550. Congress accomplished this goal by requiring federal courts to give a presumption of correctness to state court fact findings unless one of eight exceptions was established.

One of these exceptions recognizes, as *Townsend* does, that state court factual findings will not be presumed correct when material facts were not adequately developed in the state proceeding. 28 U.S.C. § 2254(d)(3). The language of that exception does not address whether Congress intended deliberate by-pass or cause and prejudice to govern its application. But Congress' goal of minimizing the friction that occurs whenever a federal habeas court overturns "the factual . . . conclusions reached by the state-court system" supports the latter interpreta-

tion. *See Sumner v. Mata*, 449 U.S., at 550. The deliberate bypass test would increase, not minimize, the friction.

Moreover, the Court recently held that a related statutory provision, 28 U.S.C. section 2244(b), prohibits successive petitions unless the petitioner can establish cause and prejudice for failing to raise all his issues in the first petition. *McCleskey v. Zant*, 111 S. Ct., at 1470. Section 2244(b) and section 2254(d) were enacted in the same 1966 bill. *See* 80 Stat. 1104-1106. There is no reason to think that Congress intended that cause and prejudice would apply to the section of the bill on successive petitions, but not to the section concerning evidentiary hearings. Indeed, in *Brown v. Allen*, 344 U.S., at 463, the Court recognized that logically the same standard should apply to both situations.

> [T]his Court approved in *Salinger v. Loisel* 265 U.S. 224, 231, the procedure that a federal judge might refuse a writ where application for one had been made to and refused by another federal judge and the second judge is of the opinion that in light of the record a satisfactory conclusion has been reached. That principle is also applicable to state prisoners. *Ibid.* (footnote omitted).[10]

The legislative history leads to the same conclusion. The most detailed explanation of what is now section 2254(d) comes from a report the Habeas Committee of the Judicial Conference of the United States prepared in 1964.[11] Before presenting the

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[10] The legislative history of section 2254(d) quotes this passage from *Brown*. *See* H.R. Rep. No. 1384, 88th Cong., 2d Sess., 24-25 (1964). For an explanation of the relevance of the 1964 legislative history, see note 11 *infra*.

[11] The Habeas Committee proposed the first version of what is now § 2254(d) to Congress in 1964. *See* H.R. Rep. No. 1384, *supra*, at 19-20 (setting out proposed bill). The Committee's explanation was presented to (continued...)

text of the subsection, the report notes that "it may be helpful to refer to certain adjudicated cases." H.R. Rep. No. 1384, 88th Cong., 2d Sess., 23 (1964). The quotations included in the report emphasize both the federal courts' power to redetermine the facts and the need for deference to state fact finding. *Id.*, at 24-25. The report thus notes the statement from *Brown v. Allen*, 344 U.S., at 458 that "where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the district court may properly depend upon the State's resolution of the issue." *Id.*, at 24. Similarly, it quotes *Brown* for the proposition that a federal court need not hold a new federal evidentiary hearing "where the legality of [the habeas petitioner's] detention has been determined, on the facts presented, by the highest State court with jurisdiction." *Id.*, at 25. And the report concludes by citing Professor Bator's article on Finality in Criminal Law, which reasons that the interest in finality of convictions should limit a federal court's authority to those cases in which the state procedures prevented the state

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[11](...continued)
Congress in 1964 and included in the House Report. Although the 1964 bill did not pass, a substantially similar version of the bill, which became section 2254(d), was presented to Congress in 1966. H.R. Rep. No. 1892, 89th Cong., 2d Sess., 12-15 (1966); *accord* S. Rep. No. 1797, 89th Cong., 2d Sess., 7-10 (1966). The 1966 Habeas Committee Report explained that the bill was the same as in 1964 except that it no longer required a three-judge court to hold a hearing on a habeas petition. *Ibid.* Because the 1966 report does not address issues already covered in the 1964 report, the 1964 report provides the fullest discussion of section 2254(d).

courts from fairly considering the petitioner's federal claims.[12] *Ibid.*

The emphasis on finality and deference to state fact findings in the Judicial Conference Report mirrors the concerns that have led the Court to apply the cause and prejudice test in other areas. Those concerns support application of the same standard to determine when a habeas petitioner's failure to take advantage of state proceedings will entitle him to a new federal evidentiary hearing. Indeed, the Senate Report notes:

> [T]he proposed legislation, if enacted, will be a strong inducement to the States that have not already done so to provide adequate postconviction remedies and procedures to make and keep available records of evidentiary matter in criminal and postconviction proceedings, and to the State courts in criminal proceedings to safeguard the constitutional rights of defendants.

S. Rep. No. 1797, 89th Cong., 2d Sess., 3 (1966) (quoting Habeas Committee Report). Congress could not both have intended section 2254(d) to be an inducement to the States to develop their own post-conviction procedures and also have intended to make deliberate by-pass the test of when a habeas petitioner would receive a new evidentiary hearing. The two concepts are antithetical.

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[12] *Townsend v. Sain*, *supra*, is mentioned only once in the Habeas Committee's report. *See* H.R. Rep. No. 1384, *supra*, at 24. The report quotes *Townsend* for the proposition that a federal district court's duty to scrutinize the state court record is no less exacting than the Supreme Court's duty to scrutinize the state record on direct review. *Ibid.*

Had Congress expressly stated that it intended to codify *Townsend*'s use of the deliberate by-pass standard, the issue would be different. Referring, however, to *Townsend*'s analogy to direct review provides little reason to infer that Congress intended to follow that course. It instead negates it.

D. The Court of Appeals' Judgment Should Be Reversed and Remanded.

Both this Court's cases and the congressional intent that can be gleaned from section 2254(d) demonstrate that the Ninth Circuit erred in holding that deliberate by-pass defines when a petitioner's failure to develop facts in state court will entitle him to a new evidentiary hearing. Cause and prejudice instead provides the correct standard.

On this record, it is appears that Tamayo-Reyes lacked cause. The only basis identified below for failing to develop the facts was his post-conviction counsel's omission, and *Coleman v. Thompson*, 111 S. Ct., at 2566-2567, establishes that such a failure is insufficient. When, however, Tamayo-Reyes requested a new evidentiary hearing in district court, it was unclear whether he had to establish cause and prejudice or merely the lack of a deliberate by-pass. Because he did not know he had to meet the higher standard, he may not have brought forward evidence to establish it. In these circumstances, a remand to the district court would be appropriate to allow Tamayo-Reyes to show, if possible, whether cause and prejudice excused his failure to develop the material facts in state post-conviction court.

CONCLUSION

For the reasons stated above, the court of appeals' judgment should be reversed and remanded.

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